

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8538

WRITER'S E-MAIL ADDRESS
phemmersbaugh@sidley.com

June 21, 2005

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN 21 2005

Part of
Public Record



Re: STB Docket No. 42093, BP Amoco Chemical Co. v. Norfolk Southern Railway Co.

Dear Secretary Williams:

Enclosed, for filing in the above-referenced matter, are the original and ten copies of **Norfolk Southern Railway Company's Reply to Comments of BP Amoco Chemical Company on Certain Issues Raised by the Board in its Decision Served June 6, 2005.** Also enclosed is a computer disk containing an electronic copy of the filing.

Please file-stamp the enclosed copies for our files, and return the stamped copies with our messenger. If you have any questions concerning this filing, please contact one of the undersigned.

Very truly yours,


G. Paul Moates

Paul A. Hemmersbaugh

cc: Michael McBride
George Aspatore

BEFORE THE
SURFACE TRANSPORTATION BOARD



BP AMOCO CHEMICAL COMPANY,

Complainant,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent,

214221

STB Docket No. 42093

ENTERED
Office of Proceedings

JUN 21 2005

Part of
Public Record

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY
TO COMMENTS OF BP AMOCO CHEMICAL COMPANY ON CERTAIN
ISSUES RAISED BY THE BOARD IN ITS DECISION SERVED JUNE 6, 2005**

Norfolk Southern Railway Company ("NS") respectfully submits its Reply to the Comments filed by BP Amoco Chemical Company ("BP Amoco") in response to the Surface Transportation Board's ("STB" or "Board") June 6 Decision in this matter. See "Comments of Complainant BP Amoco Chemical Company on Certain Issues Raised By the Board in its Decision Served June 6, 2005," *BP Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Doc. No. 42093 (filed June 16, 2005) ("BP Comments").

I. THE CHANGES BP AMOCO PROPOSES WOULD ADD COMPLEXITY AND EXPENSE TO THIS PROCEEDING.

Overall, the changes BP Amoco advocates in its Comments would add significant complexity and expense to a proceeding whose aim is to assess the reasonableness of a challenged common carrier rate in a "simplified and expedited" manner. See *Decision* at 2; 49 U.S.C. 10701(d). Moreover, the complicating changes BP Amoco proposes would not

significantly improve the quality of the analysis or its fidelity to governing statutes, regulations, and economic principles.

1. Variable Cost Evidence. BP Amoco's proposed approach to variable costs could increase significantly the complexity of this proceeding. BP Amoco suggests that the Board should use unadjusted URCS costs in one context; make unlimited cost adjustments to derive "actual" costs in another; and, in some circumstances, make selected (but largely unspecified) adjustments where BP Amoco determines such "modifications are necessary." *See* BP Amoco Comments at 4-5. Such an approach would very likely lead to precisely the result the Board seeks to avoid – lengthy and costly disputes over when, where, and how much variable costs should be adjusted in various circumstances.

Moreover, the number and expense of disputes over variable costs would grow exponentially if the Board were to grant BP Amoco's further request that the "comparison traffic" consist of all the disparate types of traffic in the entire NS Waybill Sample. BP Amoco proposes that the Board use (and develop variable costs for) all traffic in the entire NS Waybill Sample, including traffic having little in common with the issue traffic, and traffic generating R/VC ratios below 1. BP Amoco Comments at 8-10. Injection of such complexity would require the parties and the Board to devote substantially more time and resources to this proceeding.

The approach NS proposes, by contrast, would allow a small number of readily ascertainable and verifiable adjustments to URCS costs, without compromising the aim of conducting an expeditious, relatively inexpensive proceeding.¹ To further enhance the

¹ Even in the sort of streamlined proceeding the Board seeks to conduct, a limited number of cost adjustments are necessary to ensure accuracy and consistency with governing law and regulations. *See* NS Comments at 2-6 (specifically identifying what NS presently believes to be the three most significant of those adjustments).

efficiency of the determination of relevant costs, NS has also proposed that the Board determine, in Phase I of the proceeding, a small number of specific adjustments to URCS costs that the Board will consider in subsequent phases of the proceeding. *See, e.g.*, NS Comments at 2.² Once the Board has identified the specific adjustments it will consider, the parties will not need to expend time and resources developing and submitting evidence regarding other cost adjustments, and the Board's staff will not be required to analyze such evidence.

2. Traffic Set for Developing R/VCCOMP. BP Amoco's suggestion that the Board use the entire NS Waybill Sample to develop the R/VCCOMP benchmark is not only inconsistent with the purpose of the benchmark (to test the challenged rate against rates the carrier charges for *comparable captive traffic*) it would also add substantial cost, complexity, and delay to the proceeding without yielding significant additional useful information for purposes of determining the reasonableness of the challenged rate. The Board's decision to calculate the R/VCCOMP benchmark using a group of comparable traffic with R/VC ratios in excess of 180% (rather than all of the disparate traffic captured in the Waybill Sample) is exactly what the Board's regulations prescribe. *See Guidelines*, Ex Parte 347 (Sub-No. 2), slip op. at 25-27 (served Dec. 31 1996). What BP Amoco seeks is a material change to regulations adopted in notice-and-comment rulemaking. As NS' opening Comments made clear, such a change cannot be made in an individual adjudication, and would be appropriate, if at all, only if adopted through a notice-and-comment rulemaking in which all interested parties would have an opportunity to participate and provide input. *See* NS Comments at 5-6.

² In this phase, each party be entitled to propose whatever specific cost adjustments it believes are necessary and important, and the Board may then determine which adjustments will be eligible for consideration in subsequent phases of the proceeding.

3. Long-Cannon Factors. BP Amoco's proposal that the Board consider additional evidence and analyses regarding the Long-Cannon factors also has significant potential to complicate and prolong this proceeding. Although BP Amoco's comments do not specify what type of evidence or analysis it proposes to submit in connection with the Long-Cannon factors (other than requesting that the Board consider all Waybill Sample traffic), it is almost certain that whatever evidence BP Amoco submits will require a response from NS. In such a process, any number of additional disputes could arise, each of which might require further evidentiary submissions by one or both parties, possibly in connection with separate, unrelated, and dissimilar movements that have no bearing on the movement at issue.

BP Amoco is incorrect when it suggests that the Long-Cannon Amendment requires the Board to use the entire Waybill Sample. *See* BP Amoco Comments at 9. By its terms, the Long Cannon Amendment requires only that the Board "give due consideration to" the enumerated factors, in light of the overall policy goal of the statute "that rail carriers shall earn adequate revenues." *See* 49 U.S.C. 10701(d)(2). The decade-long history of Ex Parte 347 (Sub-No. 2) testifies to the efforts of the ICC and the Board to give due consideration to, and balance, the sometimes competing goals and policies of the governing statute. The result of that extensive notice-and-comment rulemaking process is embodied in the governing regulations set forth in the *Rate Guidelines – Non-coal Proceedings*, 1 STB 1004 (1996). The Board's June 6 *Decision* essentially reiterates the comparable traffic group selection criteria for the R/VCCOMP benchmark that the Board adopted in the 1996 regulations. *See Decision* at 11. While BP Amoco may disagree with those regulations and their implementation of the Long-Cannon factors, there can be no dispute that Board's use of those same criteria here represents an application of – and not a departure from – the substance of those regulations.

Together, BP Amoco's comments serve to highlight the value and importance of using Phase I of this proceeding to identify and determine, at the outset, what URCS costs and adjustments the Board will (and will not) consider in this proceeding. By establishing at the outset what cost adjustments may be considered, the Board can effectively limit further disputes to questions of the applicability and amount of those specific adjustments for traffic involved in this proceeding. By providing clarity and a significant degree of certainty regarding available cost adjustments in Phase I, the Board could achieve its goal of simplifying the calculation of relevant costs -- thereby reducing the time and resources of the parties and Board staff required to make those determinations -- while still allowing the small number of adjustments to URCS costs that are necessary to ensure compliance with the requirements of governing statutes, regulations, and policy.

The desirability of limiting the costs and complexity of the cost evidence in this case is particularly apparent in light of the fact that costs and cost ratios are only the starting point for the Board's rate reasonableness analysis. In considering whether to adopt complicating procedures and analyses for determining costs, revenue-to-variable-cost ratios and comparisons of such ratios, it is important to keep those factors in the proper context. Governing regulations repeatedly emphasize that the three benchmark ratios provide only the starting point for a rate reasonableness analysis under the modified guidelines. *See, e.g.,* NS Comments at 7-9.³

³ Thus, the significant additional time and resources of the Board and the parties inherent in the approach BP Amoco advocates (including the costing of all traffic in the full NS Waybill Sample) all would be expended only to provide a simplistic "starting point for what must become a more particularized analysis" of the many other factors necessary to satisfy the requirements of governing statutes and regulations. *Modified Guidelines*, 1 STB 1004, 1020. If the costs and length of these proceedings are to be minimized, it is essential that threshold cost and ratio determinations be completed as efficiently as possible while still ensuring that the results of such determinations are fair, accurate, and consistent with governing legal requirements, regulatory policy, and underlying economic principles and policies.

II. THE BOARD'S VARIABLE COST CALCULATIONS SHOULD INCLUDE THE CAR MILEAGE ALLOWANCE NS PAYS FOR THE ISSUE MOVEMENT.

One particularly important adjustment – adjusting the URCS costs of the issue movement to account for NS' payment of the full car mileage allowance – requires specific discussion. BP Amoco asserts that NS' payment of that allowance, which is a condition of the challenged common carrier rate, should not be considered a variable cost of the issue movement. *See* BP Amoco Comments at 5-6. It is well-established, however, that a carrier's payment of mileage allowances is properly treated as a variable cost of the movement, both for purposes of rail rate reasonableness proceedings, and for regulatory accounting purposes. *See, e.g., FMC Wyoming Corp v. Union Pacific Railroad Co.*, STB Doc. No. 42022, STB Ex Parte No. 346 (Sub-No. 29A), Decision (served May 12, 2000) ("*FMC*").

In *FMC*, the carrier (Union Pacific) transported some of the issue traffic in private cars, and paid the owner of those cars a mileage allowance. Complainant FMC argued that, contrary to longstanding precedent, the mileage allowance UP paid in connection with a movement should be treated not as a variable cost of that movement, but rather as a reduction in the revenue that it generated – the same argument BP Amoco makes here. *Compare FMC*, slip op at 67 with BP Amoco Comments at 6. The Board rejected FMC's argument, making clear that car mileage allowance payments are properly accounted for as a variable cost:

We agree with UP that, when the railroad is responsible for supplying and/or paying for the car, the cost of supplying the car is properly incorporated into the movement's variable costs. Indeed, mileage allowance payments are properly recorded as an expense in the R-1 and have consistently been treated as variable costs in prior decisions. . . . Accordingly, private-car rental payments will continue to be treated as an expense and included in the development of variable costs.

FMC, slip op at 67 (emphasis added).

Even more recently, the Board made clear that the decision of whether and how to supply rail cars for a movement is the prerogative of the rail carrier. *See Texas Municipal Power Agency v. BNSF*, STB Doc. No. 42056, Decision (served September 24, 2004). The Board rejected the complainant's contention that it was inappropriate to include the cost of rail cars in the variable cost of the movement, because the complainant had requested a rate for transportation in shipper owned cars and the carrier had quoted a rate using its own rail cars. *See id.*, slip op at 3-5. The logic of *TMPA* further supports the rule explained in *FM*: When a railroad's common carrier rate specifies that the railroad will supply the necessary rail cars, or that it will pay full car mileage allowance to the owner of private cars, the cost of those cars is properly considered a variable cost of the movement in which those cars are employed. *See id.*

III. THE BOARD HAS PROPOSED THE CORRECT RSAM BENCHMARK

The Board correctly determined that the most appropriate RSAM benchmark for present purposes is the "unadjusted" RSAM. As the Board explained, reducing the RSAM ratio by excluding traffic having an R/VC ratio below 1 is not an accurate, reasonable or appropriate way to approximate a managerial efficiency adjustment: "The amount of revenue shortfall attributed to traffic with an R/VC ratio below 100% cannot provide any reasonable approximation or useful surrogate for other inefficiencies in a carrier's system." *Decision* at 10. Moreover, efforts to quantify and measure purported inefficiencies and then to develop and apply some alternative "managerial efficiency" adjustment to RSAM or other R/VC "would add undue cost and complexity to an inquiry that must necessarily sacrifice some precision to achieve simplicity." *Id.* Such added complexity and expense to develop one of three ratios that themselves are only the starting point of the analysis is inconsistent with the objectives of a simplified proceeding.

CONCLUSION

For the reasons described above, NS requests that the Board reject the changes proposed by BP Amoco and adopt the adjustments and clarifications requested in NS' opening Comments.

Respectfully Submitted,



G. Paul Moates

Paul A. Hemmersbaugh

SIDLEY AUSTIN BROWN & WOOD, LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

James A. Squires

George A. Aspatore

David A. Shelton

Norfolk Southern Railway Company

Three Commercial Place

Norfolk, Virginia 23510

(757) 629-2600

Counsel to Norfolk Southern Railway Co.

Dated: June 21, 2005

Certificate of Service

I hereby certify that, on this 21st day of June, 2005, I served a copy of **Norfolk Southern Railway Company's Reply To Comments Of BP Amoco Chemical Company On Certain Issues Raised By The Board In Its Decision Served June 6, 2005**, by causing it to be delivered by express courier to:

Michael F. McBride
Brian D. O'Neill
Laboeuf, Lamb, Greene & McRae LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728

Counsel to Complainant BP Amoco Chemical Company

